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HOGAN & HARTSON
L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

September 25, 1998

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

Dear Ms. Roman Salas:

Enclosed please find an original and four copies of the comments of MindSpring enterprises, Inc. in the above-referenced proceeding. Also enclosed is a diskette with the comments in read only format. Please contact the undersigned if you have any questions.

Sincerely,

Patricia Green

Patricia Green

cc: ITS

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List ABCDE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

To: The Commission

COMMENTS OF MINDSPRING ENTERPRISES, INC.

Charles M. Brewer
Chairman and Chief Executive Officer
MindSpring Enterprises, Inc.
1430 West Peachtree Street
Suite 400
Atlanta, GA 30309

September 25, 1998

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To: The Commission

COMMENTS OF MINDSPRING ENTERPRISES, INC.

MindSpring Enterprises, Inc. ("MindSpring") submits its comments here in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, FCC 98-188 (released Aug. 7, 1998).

EXECUTIVE SUMMARY

MindSpring is one of the nation's leading Internet Service Providers, with a particular focus on residential and small business customers. The company started as a local ISP in Atlanta in 1994, and has grown to become regional and now national in scope. MindSpring currently serves over 400,000 customers in 45 states, and employs over 650 people. MindSpring has consistently earned top marks for quality of service and customer satisfaction. It was named the ISP with the best customer support by *PC World* magazine in December 1997.

MindSpring agrees that FCC action is needed to promote the deployment of local wireline plant capable of supporting packet-switched services over the Internet. We and our customers have an immediate need for broadband, "always on," last mile loops. We are literally chomping at the bit waiting to purchase local network capacity that will unleash the Internet's full potential to improve the lives of all Americans.

However, as the transition from a circuit to a packet-switched network proceeds, the challenge will be to preserve and expand customer choice -- not close it down by giving the last mile owner the ability to exploit its market power. MindSpring strongly supports the FCC's conclusions that the market-opening provisions of the Telecom Act did not exempt ILEC data services or new technologies. 1/ We also believe that the Commission's related Advanced Services Notice of Inquiry lays the groundwork for a vital discussion of how today's vigorous Internet-related competition can be preserved and enhanced in the future. 2/

This competition has blossomed because customers have been able to reach the ISP of their choice on a dial-up basis that the ILEC cannot block. However, in the next stage of Internet development consumers will require a

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1/ NPRM at ¶¶ 32-62

2/ See Notice of Inquiry, CC Docket No. 98-146, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 98-187 (released Aug. 7, 1998)("Notice of Inquiry").

dedicated, "always on" broadband connection to the Internet; dial up service will not be enough. The loop owner then will have new and increased market power to discriminate in favor of its own ISP affiliate. It can interpose its own Internet gateway at the end of the broadband loop, standing between the customer and any other point on the Net. And it can make it impossible, or at least economically impractical, for consumers to access other ISPs over that dedicated broadband connection. The individual and small business customers served by MindSpring are particularly at risk, for they will be the most dependent on the current last mile owner.

MindSpring has discussed this problem in detail in connection with the Commission's Notice of Inquiry. We have called for the Commission to preserve what we call an "Open Systems World," a world in which the last mile owner does not exercise market power over the Internet. We also have suggested tools the Commission should consider to address this problem. 3/

Here MindSpring focuses on the Commission's proposal to allow ILECs to create structurally separated subsidiaries through which they would offer so-called "advanced services." The Commission suggests that if such a subsidiary is adequately separated from the ILEC's residual local exchange operations, it could be freed of Section 251 interconnection obligations and allowed to offer services on a

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3/ *See* MindSpring Comments, CC Docket No. 98-146 (filed Sept. 14, 1998) (hereafter "MindSpring NOI Comments"). MindSpring asks that its NOI Comments also be incorporated by reference in the docket here.

deregulated basis. (For convenience MindSpring will refer to the new subsidiary as the "New LEC" and the remaining business unit as the "Old LEC".)

MindSpring believes that by far the best solution to the last mile problem would be full divestiture of the ILEC's local wireline operations from the provision of Internet services over those facilities. Any less complete solution will preserve ILEC incentives and abilities to discriminate in favor of its affiliate. This Commission and the states will be required to scrutinize ILEC activity closely to enforce non-discrimination principles -- less so if meaningful structural separation rules are in place, but on a resource-intensive and continuing basis nonetheless.

The NPRM "advanced services" plan itself is seriously flawed in ways that would violate the Telecommunications Act. First, the plan splits the ILEC in the wrong place. It creates a division based on new services vs. old, even though both "new" and "old" services depend upon the same last mile network over which the ILEC has market power. Indeed, as discussed above, that market power will increase as all loops become dedicated in an Internet world. Yet the NPRM plan would allow the ILEC to shift next generation network plant into the New LEC, leaving the Old LEC (and ILEC competitors) with lower capacity and circuit-switched facilities that will be increasingly out of date in an Internet world. Second, the NPRM plan does not adequately address the incentives and ability of the overall ILEC enterprise to discriminate against competitors. The proposed structural rules are necessary but not sufficient to prevent ILEC abuses. In all

these circumstances, the New LEC would have to be treated as an "ILEC" for purposes of the Telecom Act interconnection rules and other purposes.

That said, MindSpring would not oppose a plan to allow an ILEC to create a separated "New LEC" if lines are drawn in the right place and discrimination safeguards are improved. In particular, the Old LEC must retain sole responsibility for the last mile within the overall ILEC enterprise. Old LEC would maintain, expand and enhance the last mile network, and sell use of that network to all service providers (including the New LEC) on the same terms. Absent full divestiture, the New LEC cannot be allowed to deploy last mile facilities of its own. Even then regulators would need to work hard to police continuing ILEC incentives to give New LEC preferential use of the last mile. But at least in these circumstance New LEC could otherwise be freed from Section 251 and treated as non-dominant with respect to its own services.

MindSpring will leave it to CLECs to discuss the Commission's specific proposals with respect to central office collocation and use of the ILEC local loops. We strongly support the FCC's proposal to improve opportunities for CLECs to use ILEC network elements to offer broadband services. However, ISPs should not have to become CLEC-style managers of local exchange plant in order to reach our customers.

Finally, MindSpring remains concerned that the last mile problem extends beyond the ILEC to the other wire owner, the cable operator. We realize that this NPRM is focused only on ILECs, and we will stick to that subject.

However, MindSpring believes that the Commission must address last mile bottleneck power wherever it exists. Thus, the decisions here may also be relevant to cable operators, especially if ILECs do not or cannot deploy broadband loops to large numbers of residential and small business premises, or if that capacity cannot be used by multiple ISPs.

I. THE TELECOM ACT REQUIRES THE COMMISSION TO FOSTER OPEN SYSTEMS AND UNLIMITED CONSUMER CHOICE IN INTERNET-RELATED SERVICES.

A. The Role Of "Open Systems" in Internet Development.

The Commission's NPRM proposals must be evaluated based on whether they advance statutory mandates for an "Open Systems World." In such a world consumers would continue to be able to connect easily with the ISP of their choice, and "last mile" entry barriers for ISPs would remain low. As a result, Internet-related services could continue their explosive and unregulated growth, while any remaining regulation would center on the last mile network itself.

"Open Systems" principles are at the core of the Telecommunications Act. For example, Section 230(b) of the Act affirms a national policy to preserve the vibrant competition in Internet services that exists today:

> It is the policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for

> the Internet and other interactive computer services, unfettered by Federal or State regulation. 4/

But this "vibrant competition" has been possible only because ILECs have not been able to use their control of the last mile to deny consumers the ability to reach ISPs of their choice. "Open System" principles also are inherent in Section 706, which emphasizes that advanced telecom capability should be deployed in a way that "promot[es] competition." 5/ More generally, the Commission has obligations to support competition arising out of the core of its governing charter, including Sections 201, 202, 214 and 251.

As telecom technology changes, the Commission must ensure that such technology does not become a new weapon that last mile owners such as the ILECs can use to block competition. Rather, that technology should be used to break down the residual market power that still remains in the local network.

MindSpring discussed the importance of "Open Systems" in detail in its NOI Comments. 6/ To summarize briefly, "Open Systems" are needed in a broadband world for at least three key reasons. First, the Commission must preserve the ability of ISPs and other non-last mile owners to drive technology innovation. Experience has shown that the exchange telephone and cable industries have been slow to participate in the Internet world, whether because of

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4/ 47 U.S.C. § 230(b).

5/ Pub. L. 104-104, Title VII § 706(b)(emphasis added), 110 Stat. 153, reproduced in notes under 47 U.S.C. § 157 (hereafter cited as § 706).

6/ MindSpring NOI Comments at 3-17.

inertia, fears that the Internet might cannibalize their businesses, or other problems.

Second, ISP competition is necessary to ensure that customers have choices with respect to the key parameters of price, service design, and customer support. MindSpring would particularly emphasize the latter. To date ISPs have helped connect individual computers to the developing applications of the Internet. This role is complicated enough to make customer support far more significant than it has been in a conventional telephony world. But support will be even more important in the future as ISPs help customers use the broadband packet loop to provide connectivity for a collection of devices in the home or office, ranging from phone-like equipment to two-way video tools, monitoring and control, and other advanced applications not yet imagined. Indeed, MindSpring suggests that as we evolve to a broadband world, today's ISPs will evolve into "Connectivity Service Providers" with a broad function to help consumers take full advantage of all packet-switched applications made possible by the Internet.

Third, "Open Systems" are important because the broadband local loop will be the path over which Americans will access much of their future information content. Internet gateway providers have an increasingly active role in helping customers process information and reach content -- through the choice of primary search engines, blocking and filtering tools (including the selection of default gateway features), preferential visibility to links for particular web sites, or provisioning of their own content. It is important to recognize that these decisions

are editorial in nature. The nation has a strong interest in maintaining low entry barriers for ISPs with differing points of view so that the local loop owner cannot exercise disproportionate power over content matters, advancing its own editorial perspectives.

B. The Increasing ILEC Market Power In a Broadband World.

This proceeding is so critical because the last mile market power of ILECs is likely to increase as the local network evolves to meet customer demands for an "always on," broadband, packet-switched two-way loop. As noted above, until recently consumers generally have been satisfied with dial-up access to ISPs over the narrowband phone network. But this connectivity will no longer be sufficient now that modems and other customer premises equipment are capable of much faster speeds, and as Internet-based applications increasingly are designed to take advantage of dedicated high speed packet technology. In the future consumer requirements for broadband local loops will only increase as new equipment and applications are designed for homes and offices that rely on those "always on" connections to the Internet. 7/

It follows that dedicated connectivity must be available that can link customers to any ISP on terms that do not discriminate in favor of the ISP affiliate

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7/ Of course, some business users already are taking advantage of faster modems and other technology by acquiring broadband connectivity to the Internet. The point is that increasingly all Americans will demand broadband connections. MindSpring is impatiently waiting to migrate its own residential and small business customers to high speed Internet connections.

of the last mile owner. Unfortunately, this result cannot be left to the market. The Commission is well-aware of the ILECs' long history of exploiting their last mile control to prevent competition. 8/ As consumer requirements evolve to "always on" applications, the ILEC's market power increases because it is no longer satisfactory for consumers to "dial-around" the ILEC over the circuit-switched network.

ILECs predictably will argue that they face competition in meeting consumer needs for local broadband. For example, they may point to cable industry plans to upgrade the second wire into many premises. However, such assertions should not influence the Commission's analysis here. MindSpring does not disagree that broadband cable presents competitive issues. But those issues arise from the market power that the cable operator also may come to enjoy as local access becomes broadband-based. At this point it is not even clear that ILECs and cable operators will be equally suited to deploy broadband in all areas. But in any event, the number of broadband loops to a premise typically will be none, one, or perhaps two. Every other ISP will require connectivity over one of those loops to reach the customer.

ILECs also may argue that they face competition from wireless technologies. However, the reality is that wireless is not an adequate substitute for "always on," two way broadband connectivity available over wire. MindSpring does not state this fact with any pleasure. We actively investigate terrestrial wireless

8/ See MindSpring NOI Comments at 18-21.

and satellite last mile options. The unfortunate truth is that these technologies are not competitive with wireline, and will not be for at least the foreseeable future. Some of them depend upon a dial-up return path which by definition fails to meet demand for two-way broadband and "always on" service applications. MindSpring is not suggesting that wireless may not meet certain specialized requirements, particularly in the large business market. 9/ We also concede that eventually technical obstacles may be overcome such that customer premises will be served by enough different last mile facilities to consider that market competitive. But our point is that this day will not come in the next five to ten years, and in the meantime Americans cannot be left without competitive choice.

MindSpring recognizes that this NPRM focuses on ILECs, and the balance of our comments will follow suit. But we also support the Commission's consideration of how to harmonize its regulatory treatment of last mile owners, and particularly cable operators. The recent report on Internet over Cable opens a very timely inquiry into the role of cable plant in promoting Internet competition. 10/ The cable issue may prove less important if (1) the ILEC plant is able to provide ubiquitous broadband connectivity and (2) barriers to use of the ILEC plant by CLECs are so

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9/ Wireless services, despite their flaws, may also have a place in rural areas where it is not economical to upgrade wireline plant. Our point, however, is that where wireline broadband is deployed, it alone will be able to meet the true demands for two-way high speed service.

10/ B. Esbin, Internet Over Cable: Defining the Future in Terms of the Past, OPP Working Paper Series No. 30 (August 1998)(hereafter "Internet Over Cable").

low that consumers have multiple last mile paths to reach ISPs. MindSpring is skeptical on both points, at least in the near term. But cable wireline is an issue for another day. For now we will focus on the market power inherent in ILEC last mile plant.

II. THE SEPARATE AFFILIATE PROPOSAL AS WRITTEN WOULD VIOLATE SECTION 251 OF THE TELECOM ACT .
[NPRM SECTION VI(B)(2)

A. Only Full Separation Through Divestiture Would Eliminate ILEC Incentives to Discriminate in the Internet Services Market.

MindSpring believes the Commission is on the right track in exploring structural remedies to address the ILEC's last mile market power. However, the proposal here draws lines in the wrong places, and contains too few safeguards to prevent anticompetitive ILEC conduct. These problems are discussed further below.

First, however, we would emphasize that the most effective way to accelerate local broadband deployment would be through full divestiture of the ILEC last mile from the provision of Internet-based services over those facilities. Full separation was the recipe that created the competitive long distance market in the 1980s. The same recipe can "preserve" and "promote" the "vibrant" Internet competition the nation enjoys today, as required by Section 230(b) of the Act. ILECs would then have an incentive to build the broadband last mile networks that ISPs have been waiting to purchase. And ILECs would have an incentive to offer

the last mile on an "Open Systems" basis to meet the requirements of all Internet applications, including those still to be developed as the Internet evolves.

MindSpring will set aside the question of under what circumstances the Commission might order full separation through divestiture. We observe that cross-ownership restrictions have been used in the past to promote competition and information diversity. 11/ The Commission should also note that some telecommunications firms have voluntarily spun off parts of their business enterprise to reduce regulation, cure conflicts of interest and maximize shareholder value. 12/ ILECs eventually may choose the same path if they become convinced that they will not be allowed to freely exercise their last mile market power to dominant the Internet market. In that event they may recognize the benefits to

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11/ See, e.g., 47 C.F.R. §73.3555 (rules prohibiting newspaper-broadcast cross-ownership, and restricting ownership of same market radio and television stations); 47 C.F.R. § 76.501 (rules restricting ability of cable operator to own broadcast or satellite master antenna service in its franchise area); 47 U.S.C. § 572 (restricting combinations of local exchange telephone companies and cable operators in the same market).

12/ For example, AT&T spun off its equipment company, creating Lucent, to correct the conflict of interest it faced trying to be a supplier to both its own telecom service operations and those of its competitors. Similarly, US West divested its cable operations, MediaOne Group, in part to reduce the conflicts and regulatory issues arising from, in its words, "sitting on both sides of the telco/cable fence." See Interview with Chuck Lillis, President, MediaOne Group, Broadcasting & Cable, April 20, 1998, at 58.

The most famous divestiture of all -- the break up of the Bell System -- was voluntary in a real sense, even though it came in the form of a consent decree in an antitrust case. For present purposes, however, what is significant is that both shareholders of AT&T, as well as long distance consumers, all reaped substantial benefits from this divestiture.

investors of full separation, with shareholders receiving interests in both (i) an unregulated services company, and (ii) a separate last mile company that would require regulation until the local loop actually is competitive.

Absent full separation, however, the Commission must be careful not to unleash ILEC last mile market power -- power that, as discussed above, will increase as all Americans come to require dedicated two way connectivity to the Internet. The NPRM proposal, unfortunately, fails this test.

B. The NPRM Does Not Draw the Separation Line in the Right Place.

1. The Proposal Would Illogically Separate the ILEC Based on New/Old Services, Rather Than Last Mile/Non-Last Mile Ownership.

The NPRM proposes that an ILEC be allowed to create a partially separated subsidiary -- which for convenience we refer to as "New LEC" -- that would offer "advanced services" as a nondominant carrier. New LEC would be excused from meeting the interconnection obligations of the Telecom Act because, the FCC posits, with sufficient structural separation it would not be a "successor or assign" of the current ILEC operating company -- which we refer to here as "Old LEC."

However, the NPRM proposal is built on a fundamentally flawed premise: that it is possible to draw a rational distinction between old "conventional" services and new "advanced" services. This is a false dichotomy, as the Commission itself recognized when it rejected ILEC arguments that "data

services" and new technologies are not covered by the Telecom Act. 13/ And it is a dangerous dichotomy, for all services -- old and new -- rely on the ILEC wireline loop to connect to customer premises.

The problem begins with the very definition of "advanced services," which the NPRM describes as "wireline broadband telecommunications services." 14/ The Commission further defines "broadband" as "sufficient capacity -- or 'bandwidth' -- to transport large amounts of information," and states that as technology evolves, the amount of capacity considered to be broadband "will evolve with it." 15/

Yet the NPRM seems to disregard that the ILECs already offer "broadband" services today -- in the form of dedicated special access and transport. The NPRM does not answer the question of where the line between "narrow" and "broadband" capacity would be drawn -- at the DS-O level? Fractional T-1? T-1? DS-3? The NPRM side-steps (or misses) this question because any line would be entirely arbitrary. We are talking about a single ILEC local exchange network. Depending upon where the ILECs have made investment to date, they can and do offer "advanced services" i.e. dedicated telecommunications services above the DS-O level. The larger the customer, the more likely it is that the ILEC has deployed

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13/ NPRM at Section V(A).

14/ Id. at ¶ 3.

15/ Id. at n.4. The Commission adds that "we may consider today's 'broadband' services to be 'narrowband' services when tomorrow's technologies appear." Id.

"broadband" capacity that the customer can use on a dedicated basis to interconnect with the Internet or for other purposes.

The NPRM proposal, then, contains a hole that an ILEC could drive the proverbial truck through. Essentially any new local exchange investment could be deemed to support "advanced services" insofar as it increases network capacity. This would be true whether the ILEC is deploying new fiber cable or upgrading electronics to a large business, installing xDSL equipment to reach customers with lower capacity needs, or anything in between. The NPRM proposal, however, would allow all such investment to be made in New LEC for that affiliate's exclusive use. The only limitation is that Old LEC would not be allowed to transfer its current local loop inventory, in its current condition, to New LEC. But New LEC would face no limitations on the additional last mile investment it would make. And Old LEC apparently would have no continuing obligation to install and improve the last mile itself. 16/

It follows that, although the NPRM speaks in terms of a separated "advanced services" subsidiary, the proposal is unbounded. The New LEC would be permitted to provide any and all services using dedicated last mile loops to any and all customer premises. The New LEC would become the repository of all network enhancements related to dedicated local exchange and exchange access services.

16/ The only exception is that Old LEC apparently would have to make any investment required to provide conventional last mile voice grade, circuit switched service. However, the need for and value of this investment will decline rapidly in an Internet-based world.

And significantly, the New LEC would assume this position at the very time that technology is demanding that (i) every customer premise obtain dedicated "broadband" links to the Internet and its related applications, and (ii) that larger customers expand the "broadband" -- i.e. greater than DS-0 -- last mile connections they have today.

2. Any ILEC Last Mile Network Must Be Subject to Section 251 Until the Loop is Fully Competitive.

Because New LEC would enjoy a preferential last mile position, the NPRM proposal for partial separation would violate Section 230(b) and 706 of the Telecom Act. As discussed above, these provisions require the Commission to preserve competition in the Internet market and prevent ILECs from exploiting their last mile ownership position. 17/ The NPRM proposal also would violate the Commission's own conclusion that Section 251(c) requires the ILECs to provide access and interconnection to all network elements, and not just the ones traditionally associated with voice telephony. 18/ The Commission can forbear from this requirement only if the interconnection provisions of the Act have been "fully implemented" and are no longer needed to serve the public interest. 19/ That time obviously has not yet come.

17/ 47 U.S.C. § 230(b).

18/ NPRM at Section V(A).

19/ 47 U.S.C. § 160.

The NPRM suggests that the separate subsidiary plan would not violate the Act because New LEC would not be a "successor or assign" of the ILEC under Section 251(h). However, this is a mere assertion without a factual foundation. The NPRM does not discuss what it means to be a "successor," but clearly New LEC would be "succeeding" to the role of Old LEC in providing dedicated last mile network. To rule otherwise would be to drain Section 251(h) of its meaning. That provision was included in the Act specifically to prevent ILECs from evading their responsibility to share with competitors their local exchange network elements (including network investment made after the Act was passed).

MindSpring submits that, so long as the ILEC can decide whether to deploy last mile network elements in either Old LEC or New LEC, both affiliates must be considered "ILECs" subject to Section 251. New LEC would be an ILEC "successor" as a matter of law under Section 251(h)(1) because it would succeed to the right and ability to replace Old LEC as the provider of facilities-based dedicated last miles to customers. It does not matter that the ILEC may choose to sell dedicated access through both the Old LEC and New LEC.

Beyond that, the Commission also should make clear by rule that in these circumstances New LEC would hold a position "comparable" to that of Old LEC under Section 251(h)(2). By definition if the ILEC enterprise can decide whether to deploy last mile facilities in either Old LEC or New LEC, then both are

"comparable" carriers. 20/ Such a ruling is important because ILECs already are establishing their own so-called "CLEC affiliates" through which they try to evade the obligations of the Telecom Act and of regulation aimed at ILEC market power. 21/

Finally, it should go without saying that the so-called "advanced services" New LEC could not be treated as a nondominant carrier. Because New LEC would enjoy the ability to deploy exclusive last mile facilities, it would be able to exploit that position against non-last mile owners such as other ISPs.

The Commission may hope that eventually the last mile will become sufficiently competitive to allow forbearance from Section 251 under the legal standards of the Telecom Act. MindSpring is skeptical that the ILEC's last mile dominance will erode soon, particularly to the premises of individual consumers and small businesses. We also do not believe that the Act's standards would be met simply by CLEC use of the ILEC last mile network elements. But in any event, the Commission's new proposals in this NPRM to promote local competition underscore

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20/ New LEC would occupy the position of Old LEC as last mile service provider for any customer requiring new or expanded dedicated connectivity, as provided in Section 251(h)(2)(A). New LEC would "substantially replace" Old LEC for all such customers, as described in subsection (B). Finally, treatment of New LEC as a "comparable carrier" is clearly consistent with the public interest in preventing evasion of Section 251's mandate that ILECs cooperate with competitors to make available their local network elements.

21/ The Competitive Telecommunications Association discusses this problem in its pending petition for declaratory ruling. See Commission Seeks Comment on Petition Regarding regulatory Treatment of Affiliates of ILECs, CC Docket No. 98-39, 13 FCC Rcd 6669 (1998).

how far we are from seeing low last mile entry barriers even on a UNE basis. Until ILECs lose their local loop market power, the Commission cannot excuse them from their interconnection obligations based on an ILEC's decision to deploy last mile facilities in a new affiliate.

C. The New ILEC Subsidiary Would Not Be Adequately Separated.

The NPRM proposal also depends in part on an assumption that New LEC will be adequately separated from Old LEC such that "it will not derive an unfair advantage from its relationship with the incumbent." 22/ The Commission suggests that if separation is adequate, then New LEC should not be deemed a "successor or assign" of Old LEC.

The Commission recognizes the obvious danger that Old LEC would discriminate in favor of its New LEC affiliate. The Commission sets forth a number of "separation requirements" aimed at this problem. 23/ Collectively these requirements attempt to make New LEC a separately managed company from Old LEC, limit transfers of property to the New LEC, and require relations between Old and New LEC to be carried out on an open and non-discriminatory basis.

Although well-intentioned, these requirements suffer from a basic problem: they attempt to reduce the ability of the ILEC to discriminate without in any respect reducing its incentive to do so. MindSpring does not minimize the

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22/ NPRM at ¶ 83.

23/ Id. at ¶ 96

former. We strongly agree that structural separation can benefit the public by making it more difficult for the ILEC to abuse its market power, and by making it easier for regulators to monitor and enforce non-discrimination rules. But partial separation is not a substitute for full divestiture, or a basis for reducing the policing of the ILEC in the absence of a full split. Structural separation, however, can have the benefit of making that policing more effective to protect consumer choice. 24/

That said, MindSpring sees two major weaknesses in the NPRM proposals. First, they are inherently flawed unless, as discussed above, Old LEC alone is responsible for all last mile local network operations. The Commission contemplates that all parties would deal with Old LEC on the same terms as New LEC. However, the NPRM proposal would allow the ILEC parent enterprise to decide how to manage overall corporate investment and marketing by steering resources to New LEC and withholding them from Old LEC. This problem will be particularly pernicious insofar as last mile activity is concerned. The ILEC enterprise will have every incentive to manage Old LEC to offer only what New LEC needs to supplement its own activity. As only one example, a customer may want a larger capacity loop to an ISP like MindSpring and go to Old LEC to request it. Under Section 251 that loop could be available either as part of the ILEC's own services, or at least as a UNE that could be used by others. But under the NPRM

24/ MindSpring does not necessarily concede that an ILEC ever could side-step Section 251 by setting up a wholly-owned affiliate. Again, we believe that full separation is the only way to isolate the ILEC's last mile market power. But even putting that legal question aside, the NPRM proposal is inadequate.